

1982 Ky. Op. Atty. Gen. 2-44, Ky. OAG 82-34, 1982 WL 176710 (Ky.A.G.)

***1 Office of the Attorney General
Commonwealth of Kentucky**

OAG 82-34

January 13, 1982

Dr. T. R. Cravens
President

Dear Dr. Cravens:

In your letter to the Attorney General, you ask if the LaRue County Public Library is subject to the city franchise tax passed on by Kentucky Utilities to its customers.

[Sections 163 and 164 of the Kentucky Constitution](#) allow a municipality to require a franchise agreement and further mandate that the municipality may receive bids for such an agreement. [Section 181 of the Kentucky Constitution](#) provides that the General Assembly shall not pass local tax laws, but may pass legislation allowing a city to impose taxes for local purposes including a franchise tax on utilities. The legislature has implemented this through the enactment of [KRS 92.281](#).

Most cities served by Kentucky Utilities are recipients of a three percent (3%) gross receipts franchise fee. The amount of revenue is determined from the gross receipts on sales of electricity to certain residential and commercial customers within the municipal franchise area. The revenues for the payment of this fee, however, are collected from customers throughout the utility service area.

The Kentucky Utility Regulatory Commission recently ordered, in the case styled, In the Matter of General Adjustment of Rate of Kentucky Utilities Company, Case Number 7804, dated November 5, 1981, that the franchise fee shall be recovered by the utility from the customers residing in the affected municipality. The commission stated as follows:

“ . . . a legislative precedent exists in that [KRS 160.613](#) allows school districts to impose a three percent (3%) utility tax to be paid by affected subscribers, and the recovery of franchise fees via a surcharge would be a logical extension of this concept. The utility merely acts as the conduit by which taxpayers are assessed a franchise fee which the utility then passes on to the municipality. [KRS 96.010](#) provides that the franchise agreement be fair and reasonable to the City, to the purchasers of the franchise, and to the patrons of the utility. Since the franchise fee becomes an identifiable part of the cost of providing service within the city or municipality, that fee should be recovered by those receiving service within the city.”

The Commission directed that the franchise fee assessed by local governments within the service area of Kentucky Utilities must be listed on the consumer's bill as a separate item and identified as such.

Libraries and library districts are established in the Commonwealth pursuant to KRS Chapter 173. These institutions are financed by local taxes as well as funding from the state government.

Section 3 of the Kentucky Consitution provides that “no property shall be exempt from taxation except as provided in this Constitution.” The only other section referring to exemption from taxation is Section 170. See [City of Louisville v. Cromwell](#), 333 Ky. 828, 27 S.W.2d 377 (1930). This section exempts from taxation certain institutions and instrumentalities including institutions of purely public charity, libraries, and educational institutions.

*2 In [Marcum v. City of Louisville Municipal Housing Commission](#), Ky., 374 S.W.2d 865 (1963), it was stipulated between the parties that the housing commission was an institution of purely public charity and within the purview of [Section 170 of the Kentucky Constitution](#). Among the issues litigated was whether the commission was exempt from the sales tax on utilities purchased by it. The Court of Appeals (now Supreme Court) ruled that the decisive test is whether the “legal incidence” of the tax falls upon the tax-exempt instrumentality. If not, the instrumentality does not have exempt status even though the “economic incidence” of the tax is borne by the instrumentality by virtue of a compensating price increase by the supplier. The Court thus held “that the sales tax is not a tax upon the appellee (Commission), and the appellee is not exempt from bearing the burden of the tax which may be passed on to it by a utility company.” At page 869.

The city franchise tax as well as the utility gross receipts license tax for schools, [KRS 160.613 to 160.617](#), are levied upon the utility company and not the library district itself. Thus, under the [Municipal Housing Commission](#) case, [supra](#), even if the district is exempted from certain taxes by [Section 170 of the Kentucky Constitution](#), it may not avoid the economic burden of this tax.

Thus, the LaRue County Public Library is not exempt from the payment of the city franchise tax imposed on Kentucky Utilities and which is, in turn, passed on to the customers in the affected area.

Sincerely,
Steven L. Beshear
Attorney General

By: Alex W. Rose
Assistant Attorney General

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